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No. 06-457

In The
Supreme Court of the United States

G. STEVEN ROWE, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MAINE,
Petitioner,

v.

NEW HAMPSHIRE MOTOR TRANSPORT ASSOCIATION, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF *AMICI CURIAE* OF FEDERAL EXPRESS CORPORATION AND THE AIR TRANSPORT ASSOCIATION OF AMERICA, INC., IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether provisions of the Maine Tobacco Delivery Law that regulate whether and how cargo carriers may provide transportation and delivery services for shipments of tobacco products are "law[s] related to a price, route, or service" of such carriers and, therefore, are preempted by the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), 49 U.S.C §§ 14501(c) & 41713(b)(4)(A).

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* FEDERAL EXPRESS CORPORATION AND THE AIR TRANSPORT ASSOCIATION OF AMERICA, INC. 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

I. THE COURT SHOULD DECIDE THIS CASE WITH DUE CONSIDERATION OF THE IMPACT THAT ITS INTERPRETATION OF PREEMPTIVE LANGUAGE THAT APPLIES EQUALLY TO AIR CARRIERS WILL HAVE ON AIRLINE OPERATIONS AND THE LAW GOVERNING AIRLINES. 4

A. Because the ADA and the FAAAA share identical preemptive language, the Court's decision regarding whether the FAAAA preempts Sections 1555-C(3)(C) and 1555-D will also determine whether the ADA preempts those statutes. 6

B. Because the ADA and the FAAAA share identical preemptive language, a change in the interpretation of that language in the context of the FAAAA will also alter the established meaning of that language in the context of the ADA, on which air carriers substantially rely. 9

II. BECAUSE THE ADA AND THE FAAAA SHARE IDENTICAL PREEMPTIVE LANGUAGE, THE COURT SHOULD ADDRESS FAAAA PREEMPTION OF THE MAINE STATUTES WITH AN EYE TOWARD PRECLUDING THE TYPE OF PATCHWORK REGULATION OF AIR CARRIERS THAT THE ADA WAS ENACTED TO PREVENT. 14

III. BECAUSE THE ADA AND THE FAAAA SHARE IDENTICAL PREEMPTIVE LANGUAGE, THE PRESUMPTION AGAINST PREEMPTION HAS NO APPLICATION IN THIS CASE. 21

IV. SECTIONS 1555-C(3)(C) AND 1555-D ARE CLEARLY PREEMPTED BY THE PLAIN LANGUAGE OF THE ADA AND THE FAAAA. 26

CONCLUSION 28

TABLE OF AUTHORITIES

CASES

American Airlines v. Wolens,
513 U.S. 219 (1995) ..... *passim*

Botz v. Omni Air Int'l,
286 F.3d 488 (8th Cir. 2002) 13

City of Columbus v. Ours Garage & Wrecker Serv., Inc.,
536 U.S. 424 (2002) 20

Deerskin Trading Post, Inc. v. United Parcel Serv. of Am., Inc.,
972 F. Supp. 665 (N.D. Ga. 1997) 8

Dep't of Transp. v. Pub. Citizen,
541 U.S. 752 (2004) 11

Egelhoff v. Egelhoff,
532 U.S. 141 (2001) 26

Federal Express Corp. v. Cal. Pub. Util. Comm'n,
936 F.2d 1075 (9th Cir. 1991) 1

Flagg v. Yonkers Sav. & Loan Ass'n,
396 F.3d 178 (2d Cir. 2005) 21

Hillsborough County v. Automated Med. Labs., Inc.,
471 U.S. 707 (1985) 25

Holloway v. United States,
526 U.S. 1 (1999) 26

Huntleigh Corp. v. Louisiana State Bd. of Private Sec. Examiners,
906 F. Supp. 357 (M.D. La. 1995) 13

Lyn-Lea Travel Corp. v. American Airlines, Inc.,
283 F.3d 282 (5th Cir. 2002) 13

Marlow v. AMR Servs. Corp.,
870 F. Supp. 295 (D. Hawaii 1994) 13

Medtronic, Inc. v. Lohr,
518 U.S. 470 (1996) 21

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran,
456 U.S. 353 (1982) 11

Morales v. Trans World Airlines,
504 U.S. 374 (1992) ..... *passim*

N.H. Motor Transp. Ass'n v. Rowe,
377 F. Supp. 2d 197 (D. Me. 2005) 15, 25

N.H. Motor Transp. Ass'n v. Rowe,
448 F.3d 66 (1st Cir. 2006) 8

Northwest Airlines v. Minnesota,
322 U.S. 292 (1944) 22

Pharm. Research & Mfrs. of Am. v. Walsh,
538 U.S. 644 (2003) 25

Read-Rite Corp. v. Burlington Air Express, Ltd.,
186 F.3d 1190 (9th Cir. 1999) 13

Sam L. Majors Jewelers v. ABX, Inc.,
117 F.3d 922 (5th Cir. 1997) 23

Smith v. Comair, Inc.,
134 F.3d 254 (4th Cir. 1998) 13

United Airlines, Inc. v. Mesa Airlines, Inc.,
219 F.3d 605 (7th Cir. 2000) 13

United Parcel Serv., Inc. v. Flores-Galarza,
318 F.3d 323 (1st Cir. 2003) 24

United States v. Locke,
529 U.S. 89 (2000) ..... *passim*

United States v. Turkette, 452 U.S. 576 (1981) .. 26

STATUTES

49 U.S.C. App. § 1305(a)(1) 5
49 U.S.C. § 14501(c)(1) 2, 5, 6
49 U.S.C. § 40101(a) 14
49 U.S.C. § 41713(b)(1) 2, 5, 6, 23
49 U.S.C. § 41713(b)(4)(A) 2, 5, 6
Pub. L. No. 75-706, 52 Stat. 973 (1938) 22
Pub. L. No. 95-504, 92 Stat. 1705 (1978) 2
Pub. L. No. 103-272, 108 Stat. 745 (1994) 11
Pub. L. No. 103-305, 108 Stat. 1569 (1994) 2, 7
720 Ill. Comp. Stat. Ann. § 678/5 (West 2004) 16, 17
720 Ill. Comp. Stat. Ann. § 678/5(a) (West 2004) 16, 17
720 Ill. Comp. Stat. Ann. § 678/5(c) (West 2004) 16, 17
Idaho Code Ann. § 39-5704 (Supp. 2007) 17
Idaho Code Ann. § 39-5705 (Supp. 2007) 17

Idaho Code Ann. § 39-5707(1) (Supp. 2007) 17
Idaho Code Ann. § 39-5715 (Supp. 2007) 17
Idaho Code Ann. § 39-5717 (Supp. 2007) 16
Me. Rev. Stat. Ann. tit. 22, § 1555-C(3)(C) .. *passim*
Me. Rev. Stat. Ann. tit. 22, § 1555-C(3)(C)(1) ... 27
Me. Rev. Stat. Ann. tit. 22, § 1555-C(3)(C)(2) . 16, 27
Me. Rev. Stat. Ann. tit. 22, § 1555-C(3)(C)(3) ... 27
Me. Rev. Stat. Ann. tit. 22, § 1555-D ..... *passim*
2003 Me. Laws 444 23
Mich. Comp. Laws Ann. § 205.431(4) (West Supp. 2007) 18
N.Y. Pub. Health Law §§ 1399-*ll*(1)-(2) (McKinney 2002) 16
Nev. Rev. Stat. § 370.329 (2005) 19
R.I. Gen. Laws § 11-9-13.11(b) (2005) 18
Tenn. Code Ann. § 67-4-1029 (2005) 19
Wash Rev. Code Ann. § 70.155.105(1)(a) (West Supp. 2007) 18
Wash Rev. Code Ann. § 70.155.105(1)(b) (West Supp. 2007) 18
Wash Rev. Code Ann. § 70.155.105(2) (West Supp. 2007) 18
Wash Rev. Code Ann. § 70.155.105(4)(b) (West Supp. 2007) 18

OTHER AUTHORITIES

Ann K. Wooster, *Construction and Application of § 105 Airline Deregulation Act (49 U.S.C.A. 41713), Pertaining to Preemption of Authority over Prices, Routes, and Services*, 149 A.L.R. Fed. 299 (1998) 12

FedEx Service Guide, *available at* http://www.fedex.com/us/services/terms/popup_tc_us_body.html#tobaccoproducts 27

H.R. Rep. No. 103-677 (1994) (Conf. Rep.), *as reprinted in* 1994 U.S.C.C.A.N. 1715 ..... 7, 11, 15

Paul Stephen Dempsey, *Transportation: A Legal History*, 30 TRANSP. L.J. 235 (2003) 23

INTEREST OF *AMICI CURIAE* FEDERAL EXPRESS CORPORATION AND THE AIR TRANSPORT ASSOCIATION OF AMERICA, INC.[1]

Federal Express Corporation, which does business as FedEx Express ("FedEx Express"), is a federally certified, all-cargo air carrier that delivers packages and other cargo in all fifty states and throughout the world. *See Federal Express Corp. v. Cal. Pub. Util. Comm'n*, 936 F.2d 1075, 1076 (9th Cir. 1991). FedEx Express filed an *amicus* brief in support of Respondents in the court below.

FedEx Express is now joined as *amicus curiae* by the Air Transport Association of America, Inc. (the "Airline Association"), an association of eighteen U.S. cargo and passenger airlines and three foreign airlines. The Airline Association's domestic airline members are: ABX Air; Alaska Airlines; Aloha Airlines; American Airlines; ASTAR Air Cargo; Atlas Air; Continental Airlines; Delta Air Lines; Evergreen International Airlines; FedEx Express; Hawaiian Airlines; JetBlue Airways; Midwest Airlines; Northwest Airlines; Southwest Airlines; United Airlines; UPS Airlines; and US Airways. These air carriers operate within the United States, as well as between the United States and foreign countries. The Airline Association's foreign airline members are: Air

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[1] The parties have consented in writing to the filing of this brief, which was authored in its entirety by counsel for *amici curiae*. No person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of this brief.

Canada, Air Jamaica, and Mexicana. These foreign air carriers operate between the United States and foreign countries and are subject to suit in the United States. A principal purpose of the Airline Association is to support its air carrier members by promoting the cost-effective delivery of air transportation services and advocating common industry positions on important policy and legal issues. Since its inception in 1936, through both regulated and deregulated eras, the Airline Association has been involved in the development of the law governing the carriage of goods and passengers by air.

A central feature of the law governing FedEx Express and the other members of the Airline Association is the Airline Deregulation Act of 1978 ("ADA"), Pub. L. No. 95-504, 92 Stat. 1705 (1978), which has long prevented air carriers from being subject to a complicated patchwork of state regulations by prohibiting states from enacting or enforcing laws or regulations "related to" the prices, routes, or services of an air carrier. *Id.* § 4(a), 92 Stat. at 1708 (currently codified at 49 U.S.C. § 41713(b)(1)). The subsequently enacted Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), Pub. L. No. 103-305, 108 Stat. 1569 (1994), which is at issue in this case, contains preemptive language that is both identical to preemptive language in the ADA and further addresses preemption with regard to air carrier transportation of property. *Id.* tit. VI, § 601(b)–(c), 108 Stat. at 1605–06 (currently codified at 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A)). FedEx Express and the Airline Association therefore have an interest in this case because the Court's decision will affect the preemptive scope of the ADA and the FAAAA.

SUMMARY OF THE ARGUMENT

The FAAAA, which applies to motor and other carriers, and the ADA, which applies to air carriers, share identical preemptive language and common deregulatory purposes. The resulting interrelationship between these two statutes therefore plays a vital role in the Court's decision of this case, which will impact air carriers as well as motor carriers. Because the FAAAA and the ADA share identical preemptive language, the Court's decision regarding whether the FAAAA preempts the challenged sections of Maine's Tobacco Delivery Law will apply with equal force to any Airline Association members that qualify as "delivery services" under Maine's law. Moreover, the effects of the Court's decision would be even more far-reaching if it were to accept petitioner's invitation to revisit its established interpretation of the preemptory language contained in the ADA and the FAAAA. Such a reexamination would introduce uncertainty into the expansive body of ADA-preemption law that has developed in accordance with this Court's precedent and on which air carriers, including FedEx Express and the other members of the Airline Association, rely. It is, therefore, both unwise and unwarranted.

The interrelationship between the FAAAA and the ADA not only magnifies the implications of the Court's decision in this case, but also shapes its substantive resolution. Because Congress intended for the FAAAA and the ADA to have the same preemptive effect, what is true of the ADA should be true of the FAAAA as well. State laws like Sections 1555-C(3)(C) and 1555-D contribute to the type of patchwork that Congress sought to prevent by enacting the ADA. A

finding that such laws are preempted therefore fulfills Congress' purpose for both the ADA and the FAAAA. Likewise, because this Court's precedent shows that no presumption against preemption by the ADA would apply in this context, no presumption against preemption by the FAAAA applies. Yet even if such a presumption were to apply, the plain language of the ADA would overcome it. Because Sections 1555-C(3)(C) and 1555-D "relate to" the services of air and motor carriers, they fall within the express preemptory language of both the ADA and the FAAAA.

Accordingly, this Court should affirm the First Circuit's holding that the FAAAA preempts Sections 1555-C(3)(C) and 1555-D of Maine's Tobacco Delivery Law. By so ruling, this Court will not only fulfill Congress' intent for the FAAAA, but also will reaffirm the nationally uniform rules governing interstate transportation by air that Congress envisioned, that the lower courts developed in reliance on this Court's precedent, and on which air carriers routinely rely.

ARGUMENT

I. THE COURT SHOULD DECIDE THIS CASE WITH DUE CONSIDERATION OF THE IMPACT THAT ITS INTERPRETATION OF PREEMPTIVE LANGUAGE THAT APPLIES EQUALLY TO AIR CARRIERS WILL HAVE ON AIRLINE OPERATIONS AND THE LAW GOVERNING AIRLINES.

The Court should be cognizant of the impact its decision in this case will have on air carriers and the

law governing their operations. Preemptive language in the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), currently codified at 49 U.S.C. §§ 14501(c)(1), 41713(b)(4)(A), is the same as that of the Airline Deregulation Act ("ADA"), currently codified at 49 U.S.C. § 41713(b)(1), upon which FedEx Express and the other members of the Airline Association rely.[3] This Court's determination of whether the FAAAA preempts the challenged portions of Maine's Tobacco Delivery Law, Me. Rev. Stat. Ann. tit. 22, §§ 1555-C(3)(C) and 1555-D, will therefore apply with equal force to any members of the Airline Association that qualify as "delivery services" under Maine's law. Moreover, the phrase "related to a price, route, or service" in the ADA has a settled meaning around which the current landscape of air carriage law has developed. Any change to the understanding of that phrase in the context of the FAAAA will result in a corresponding change to the ADA, which will disrupt the established body of law under which FedEx Express and the other members of the Airline Association operate.

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[3] The ADA's preemption clause was originally codified at 49 U.S.C. App. § 1305(a)(1). It was recodified at its current location, with only technical changes that Congress intended to have no substantive effect, in 1994. *See American Airlines, Inc. v. Wolens*, 513 U.S. 219, 222–23 & n.1 (1995).

A. Because the ADA and the FAAAA share identical preemptive language, the Court's decision regarding whether the FAAAA preempts Sections 1555-C(3)(C) and 1555-D will also determine whether the ADA preempts those statutes.

The Court's decision in this case will directly affect air carriers who qualify as "delivery services" under Maine's law because the FAAAA, which applies to air carriers as well as motor carriers and intermodal carriers, has preemptive language identical to that of the ADA, which applies specifically to air carriers. The ADA preempts any "law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier," 49 U.S.C. § 41713(b)(1), while the FAAAA preempts, in relevant part, any "law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier," *id.* § 14501(c)(1), or "air carrier or carrier affiliated with a direct air carrier through common controlling ownership," *id.* § 41713(b)(4)(A) (hereinafter an "intermodal carrier").

More importantly, Congress has made clear its intent that the FAAAA and the ADA have equal preemptive effect. One of Congress' primary purposes for enacting the FAAAA was to place motor and intermodal carriers on equal footing with airlines. Congress had established broad preemption of state laws "related to a price, route or service of an air carrier" in 1978, when it deregulated the airline industry by passing the ADA. *See Morales v. Trans World Airlines*, 504 U.S. 374, 378–79 (1992). Before the passage of the FAAAA, however, there was no such

preemption for motor carriers. By 1994, Congress recognized that state regulation of motor carriers not only "impose[d] an unreasonable burden on interstate commerce," "impede[d] the free flow of trade, traffic, and transportation of interstate commerce," and "place[d] an unreasonable cost on the American consumers," Pub. L. No. 103-305, tit. VI, § 601(a)(1), 108 Stat. 1569, 1605 (1994), but also resulted in an uneven playing field between air carriers, who had the benefit of a single federal regulatory scheme, and motor and intermodal carriers, who did not.

Thus, Congress included in the FAAAA preemptive language essentially identical to the language included in the ADA, noting that "[t]he central purpose of this legislation is to extend to all affected carriers, air carriers and carriers affiliated with direct air carriers through common controlling ownership on the one hand and motor carriers on the other, the identical intrastate preemption of prices, routes, and services as that originally contained in" the ADA. H.R. Rep. No. 103-677 at 84 (1994) (Conf. Rep.), *as reprinted in* 1994 U.S.C.C.A.N. 1715, 1755; *see also id.* at 85, *as reprinted in* 1994 U.S.C.C.A.N. at 1757 (the FAAAA's preemption provision for motor carriers "is identical to the preemption provision deregulating air carriers . . . and is intended to function in the exact same manner with respect to its preemptive effects"); *id.* at 82–83, *as reprinted in* 1994 U.S.C.C.A.N. at 1754 (the FAAAA's preemption provision for intermodal carriers is intended to preempt state regulation "in an identical manner to the preemption provision passed

in 1978 contained in" the ADA).[3] Furthermore, Congress specifically intended that both the FAAAA and the ADA be given the expansive interpretation this Court applied to the ADA in *Morales v. Trans World Airlines, Inc.* *See id.* at 83, *as reprinted in* 1994 U.S.C.C.A.N. at 1755 ("[T]he conferees do not intend to alter the broad preemption interpretation adopted by the United States Supreme Court in *Morales*. . . .").

Because Congress intended the preemption provisions of the FAAAA and the ADA to have equal effect, those provisions have been construed identically. The ADA therefore preempts Sections 1555-C(3)(C) and 1555-D to the same extent that the FAAAA preempts those statutes, and vice versa. Cases interpreting one statute's preemption provisions apply with equal force to the preemption provisions of the other statute. *See, e.g., N.H. Motor Transp. Ass'n v. Rowe*, 448 F.3d 66, 75 (1st Cir. 2006) ("[I]n addition to cases interpreting the FAAAA, we look to cases interpreting the Airline Deregulation Act."); *Deershin Trading Post, Inc. v. United Parcel Serv. of Am., Inc.*, 972 F. Supp. 665, 668 (N.D. Ga. 1997) ("[I]n interpreting the preemption provisions of the FAAAA,

[3] This uniformity between the ADA and the FAAAA is crucial to ensuring a seamless system of transportation in today's world, where cargo entrusted to an air carrier may be transported "intermodally" by fluctuating combinations of truck, passenger aircraft, and/or freighter aircraft, depending on factors like the size of the cargo, the day of the week, the time of day the cargo was tendered to the carrier, security concerns, delivery requirements, or unanticipated events like bad weather or mechanical breakdowns.

the Court is guided by cases interpreting the preemption provision of the ADA."). As a result, the Court's decision in this case regarding the FAAAA's preemption of Sections 1555-C(3)(C) and 1555-D will also determine the extent to which Maine's laws, as applied to any air carriers that qualify as "delivery services" under Maine's definition, are preempted by the ADA.

B. Because the ADA and the FAAAA share identical preemptive language, a change in the interpretation of that language in the context of the FAAAA will also alter the established meaning of that language in the context of the ADA, on which air carriers substantially rely.

Since this Court's decisions in *Morales*, 504 U.S. 374, and *American Airlines v. Wolens*, 513 U.S. 219 (1995), a well-defined body of law governing air carriage has developed in the lower courts. Together, these many decisions form a nearly comprehensive outline of the scope of ADA preemption, on which air carriers and parties dealing with air carriers can ground their expectations. And underlying all of these decisions are the cornerstones of *Morales* and *Wolens*. In the course of deciding whether Sections 1555-C(3)(C) and 1555-D are preempted, therefore, this Court should reject the invitation of petitioner and its *amici* States to revisit the *Morales* and *Wolens* standard in favor of later developments in ERISA cases. *See* Pet. Br. 29; States' *Amici* Br. 22; Cert. Pet. 26–27 (citing two lower court decisions drawing on aspects of ERISA preemption analysis to decide an

FAAAA preemption question). Such a departure from the standard established by this Court in *Morales* and *Wolens* would not only violate Congress' intent that the *Morales* standard apply, but would also cause upheaval in this well-settled area of the law, leading to questions about the continued viability of the lines that have already been drawn, upsetting the legitimate expectations of air carriers and those who deal with air carriers, and, accordingly, modifying the perceptions of risk underlying current airline price structures.

In *Morales*, this Court recognized the expansive scope of preemption under the ADA. The preemptive language used by Congress in the ADA, this Court held, "express[es] a broad pre-emptive purpose," has a "broad scope" and "expansive sweep," and is both "deliberately expansive" and "conspicuous for its breadth." *Morales*, 504 U.S. at 383–84. Given this expansive language, the Court rejected the suggestion that the ADA prevents states only from "actually prescribing rates, routes, or services"; applies only to laws specifically addressed to the airline industry; or preempts only state laws that are inconsistent with federal laws. *Id.* at 385–86. Instead, this Court held in *Morales* that the ADA preempts *any* state law having a connection with or reference to an airline's rates, routes or services, unless that connection or reference is "too tenuous, remote, or peripheral . . . to have preemptive effect." *Id.* at 390.[4]

[4] Although the Court mentioned this limited exception, it "express[ed] no views about where it would be appropriate to draw th[at] line." *Morales*, 504 U.S. at 390.

Two years later, Congress codified the *Morales* decision when it reenacted Title 49 of the U.S. Code in 1994. Although it made technical amendments to the ADA's preemption provision, Congress stated that it intended no substantive change in the statute. *See* Pub. L. 103-272, § 1(a), 108 Stat. 745 (1994). By reenacting the ADA without change, Congress made the broad preemption interpretation that this Court had established in *Morales* part of the statute. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 n.66 (1982) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."); *see also Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 770 n.4 (2004).[5]

The following year, in *Wolens*, this Court reaffirmed the far-reaching scope of ADA preemption. In *Wolens*, the Illinois Supreme Court had held that general state consumer protection laws, which affected "unessential" matters like frequent flier programs, have too tenuous an effect on airline prices, routes, or services to be preempted. This Court rejected that holding, concluding that even state laws of general applicability affecting "non-essential" airline matters—such as frequent flier programs—are sufficiently "related to"

[5] Congress also specifically indicated its intention that the *Morales* standard apply to the FAAAA. *See* H.R. Rep. No. 103-677, at 83 (1994) (Conf. Rep.), *as reprinted in* 1994 U.S.C.C.A.N. 1715, 1755 ("[T]he conferees do not intend to alter the broad preemption interpretation adopted by the United States Supreme Court in *Morales*. . . .").

air carriers' prices, routes and services as to be preempted by the ADA. *Wolens*, 513 U.S. at 226–28. The Court also held that the ADA prevents states not only from enacting statutes or enforcing state common law in a way affecting an air carrier's prices, routes, or services, but also from enforcing, in breach of contract actions, anything other than the specific terms agreed on by the parties. *Id.* at 232–33 (the ADA "confines courts, in breach-of-contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement"). In sum, this Court held, states "may not seek to impose their own public policies or theories of competition or regulation on the operations of an air carrier," whether by statute or common law or equitable contract doctrines. *Id.*

Since *Morales* and *Wolens*, an expansive body of law has been built in the lower courts, lawsuit by lawsuit, on the foundation laid by this Court in those cases. This legal framework, which defines which claims are not allowed in litigation involving air carriers, provides the structure around which FedEx Express and the other members of the Airline Association order their relationships, including relationships with each other, with customers, with vendors, and with employees. The American Law Report on ADA preemption demonstrates the comprehensiveness of these cases. *See* Ann K. Wooster, *Construction and Application of § 105 Airline Deregulation Act (49 U.S.C.A. 41713), Pertaining to Preemption of Authority over Prices, Routes, and Services*, 149 A.L.R. Fed. 299 (1998) (hereinafter "the ALR"). The ALR cites over 170 cases addressing the scope of ADA preemption since this Court's decisions

in *Morales* and/or *Wolens*. *See id.* Those cases analyze ADA preemption in the context of 34 different state law causes of action, including, among others, antitrust, interference with contractual relations, products liability, and fraud; in the context of 9 types of state laws, rules, and regulations on various topics, including air ambulance service, airport security, deceptive practices, and noise and environmental issues; and in the context of several other state law issues, including the availability of punitive damages, the application of various common-law doctrines, and the availability of other miscellaneous causes of action. *See id.*

Moreover, courts have addressed ADA preemption in cases involving a variety of different parties: passengers suing passenger airlines, *see, e.g.*, *Smith v. Comair, Inc.*, 134 F.3d 254, 256 (4th Cir. 1998); shippers suing cargo airlines, *see, e.g.*, *Read-Rite Corp. v. Burlington Air Express, Ltd.*, 186 F.3d 1190, 1193 (9th Cir. 1999); employees suing airlines as employers, *see, e.g.*, *Botz v. Omni Air Int'l*, 286 F.3d 488, 492–97 (8th Cir. 2002); vendors suing airlines, *see, e.g.*, *Lyn-Lea Travel Corp. v. American Airlines, Inc.*, 283 F.3d 282, 288 (5th Cir. 2002) (travel agent); airlines suing airlines, *see, e.g.*, *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605, 606–07 (7th Cir. 2000); and even non-airlines suing non-airlines, *see, e.g.*, *Lyn-Lea Travel Corp.*, 283 F.3d at 287 n.8 (travel agent suing non-air-carrier subsidiary); *Huntleigh Corp. v. Louisiana State Bd. of Private Sec. Examiners*, 906 F. Supp. 357, 362 (M.D. La. 1995) (corporation providing pre-departure screening at airports suing state board of security examiners); *Marlow v. AMR Servs. Corp.*,

870 F. Supp. 295, 297–98 (D. Hawaii 1994) (employee suing jetbridge maintenance company).

This extensive body of law, which guides air carriers and those who deal with air carriers as they navigate the channels of ADA preemption, is drawn on this Court's decisions in *Morales* and *Wolens*. This Court should, therefore, reject Petitioner's invitation to import developments in ERISA law into this context contrary to Congress' intent and, instead, should reaffirm the broad preemption interpretation that it has already established, Congress has adopted, and on which air carriers have relied.

II. BECAUSE THE ADA AND THE FAAAA SHARE IDENTICAL PREEMPTIVE LANGUAGE, THE COURT SHOULD ADDRESS FAAAA PREEMPTION OF THE MAINE STATUTES WITH AN EYE TOWARD PRECLUDING THE TYPE OF PATCHWORK REGULATION OF AIR CARRIERS THAT THE ADA WAS ENACTED TO PREVENT.

In 1978, Congress released the air transportation industry from intensive federal regulation because it determined that such deregulation would best further "efficiency, innovation, and low prices," as well as "variety [and] quality . . . of air transportation services." 49 U.S.C. § 40101(a). Congress recognized, however, that the states could easily undo its deregulation efforts by enacting their own regulations governing air carriers. *See Morales*, 504 U.S. at 378. With fifty states in the union, plus the District of Columbia, airlines could be subjected to fifty-one

regulatory schemes, each with its own obligations and prohibitions. The resulting patchwork of state laws would utterly defeat Congress' goal of deregulating air carriers. Congress, unwilling to permit this evisceration of its efforts, resolved the problem by including a broad preemption clause in the ADA. *Morales*, 504 U.S. at 378–79 ("To ensure that the States would not undo federal deregulation with regulation of their own, the ADA included a pre-emption provision . . . ."). As Congress recognized when it finally extended ADA-type preemption to motor and intermodal carriers through the FAAAA, the purpose of this "deliberately expansive" preemption clause, *id.* at 384, was to protect air carriers from having to contend with a "patchwork" of state regulations. *See* H.R. Rep. No. 103-677, at 87 (1994) (Conf. Rep.), *as reprinted in* 1994 U.S.C.C.A.N. 1715, 1759; *see also id.* ("The sheer diversity of these [state] regulatory schemes is a huge problem for national and regional carriers attempting to conduct a standard way of doing business.").

Congress' purpose in relieving air carriers from piecemeal state re-regulation will not be fulfilled, however, if the FAAAA (and, thus, the ADA) do not preempt statutes like the challenged provisions of Maine's Tobacco Delivery law. While Maine's restrictions and requirements, by themselves, may not overwhelm air carriers, these restrictions cannot be considered in isolation because Maine is not the only state to have enacted provisions of this sort. To the contrary, numerous other states have passed similar laws pertaining to tobacco delivery, each with different requirements. *See N.H. Motor Transp. Ass'n v. Rowe*, 377 F. Supp. 2d 197, 204–05 (D. Me. 2005) ("Although

these state tobacco delivery laws involve similar limitations on tobacco shipments, the specific requirements vary by state."); *see also* States' *Amici* Br. 26–27 (noting that twenty-seven states require tobacco products to be labeled as such, seven states require delivery to a licensed entity, eighteen states impose age-verification requirements but not directly on the carrier, etc.); *id.* at 12 ("[S]tates differ in the restrictions they impose . . . ."). Left undisturbed by federal preemption, the Maine law—and other similar state laws "related to" the prices, routes and services of carriers—would create exactly the unmanageable patchwork of state regulations that Congress sought to avoid. This is amply illustrated by even a cursory examination of the laws of several states.

For example, New York's law on the delivery of tobacco products imposes significantly different requirements than Maine's statutes. *See* N.Y. Pub. Health Law §§ 1399-*ll*(1)–(2) (McKinney 2002). It requires carriers to consult New York's own, unique list of licensed tobacco retailers before delivering tobacco products. *Id.* New York's law also prohibits the delivery of cigarettes to any home or residence, *id.*, while Maine's statutes permit delivery to a home but require the carrier to deliver the package only to the addressee himself, *see* Me. Rev. Stat. Ann. tit. 22, § 1555-C(3)(C)(2).

Idaho law imposes very different restrictions. It imposes no limitations on delivery to a home rather than a licensed retailer, but it considers a carrier that delivers a package labeled as containing tobacco products to be a "distributor" of such products. Idaho Code Ann. § 39-5717 (Supp. 2007). Thus, carriers who

wish to avoid liability in Idaho may have to comply with a number of unique requirements, including obtaining a tobacco permit, *id.* § 39-5704; verifying that tobacco products are in "the federally required sealed package provided by the manufacturer," *id.* § 39-5707(1), which may require opening the shipping packaging; requesting and examining photo identification from the recipient, *id.* § 39-5705; and ensuring that the entity selling the tobacco obtained proof that the purchaser was at least 18 years old, the credit or debit card was issued in the purchaser's name, and the shipping address matched the credit card company's address for the cardholder, *id.* § 39-5715.

Unlike Idaho and Maine, Illinois establishes requirements only for cigarette deliveries, not for all tobacco products. 720 Ill. Comp. Stat. Ann. § 678/5 (West 2004). Illinois law requires carriers to accept cigarette deliveries only from licensed distributors, which requires them to consult Illinois' individualized list of such distributors. *Id.* § 678/5(a). Likewise, carriers may deliver cigarettes in Illinois only to licensed distributors, unless they obtain from the purchaser proof of age and a signed certification confirming a variety of specific information, including that the cigarettes are not intended for consumption by a minor; that the purchaser understands that signing another person's name to the certification is illegal; and that the purchase of cigarettes by a minor is illegal under Illinois law. *Id.* § 678/5(c).

Michigan law, on the other hand, does not require carriers to obtain information regarding the purchaser's age, but it does require them to review

official identification from the person signing for the delivery confirming that he is the purchaser. Mich. Comp. Laws Ann. § 205.431(4) (West Supp. 2007). Rhode Island law is similar, but still different. Unlike Michigan, Rhode Island requires carriers to obtain the signature of the purchaser himself *or* the signature of an adult at the purchaser's address before delivering tobacco products. R.I. Gen. Laws § 11-9-13.11(b) (2005). Moreover, Rhode Island, unlike Michigan, does not require carriers to verify the recipient's identity through official identification. *Id.*

Washington State imposes still different requirements on carriers delivering cigarettes. Under Washington law, carriers must verify the age of the recipient upon delivery through official identification, Wash Rev. Code Ann. §§ 70.155.105(1)(a), (4)(b) (West Supp. 2007), and must obtain written certification that, among other things, the receiver is not a minor and has "the option to receive mailings from a tobacco company about tobacco products," *id.* § 70.155.105(1)(b). Washington law apparently also requires carriers to verify the information provided by the consumer in the certification against a database or obtain a photocopy of their official identification, and to provide a detailed notice to the consumer regarding the purchase of tobacco products in Washington. *Id.* § 70.155.105(2).

As these examples show, the wide array of state regulations relating to carriers' delivery of tobacco

products are confusing at best.[6] Moreover, as petitioner and its *amici* States point out, states have not stopped at regulating only delivery or only tobacco. Instead, they have attempted to regulate both the transportation and delivery of a variety of items. *See* Pet. Br. 23 & nn.36–37 (citing Maine's regulations on the delivery of a variety of items); States' *Amici* Br. 25 (Maine's Tobacco Delivery law is only one of "myriad state laws regulating the transportation and delivery of dangerous products"). As the *amici* States pointed out in their brief to the First Circuit, "[t]he State of New York alone has at least eleven provisions regulating the transportation or delivery of harmful or illicit items other than cigarettes," and "[a]nalogous laws in other States are too numerous to set forth here." States' First Circuit *Amici* Br. 28–29. Without preemption, air carriers that transport items colorably subject to New York's existing regulations may have to comply with eleven different state law provisions, each of which may impose several individual requirements, to ensure that they lawfully transport a single item by air to New York. If all fifty states and the District of Columbia had, like New York, eleven such provisions regulating the delivery of certain items, air carriers might be obligated to comply with 561 different state laws just to provide their core service of interstate air transportation.

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[6] And the patchwork of laws is growing. Michigan's law, for instance, was enacted after the Respondents moved for summary judgment in the district court. *See also, e.g.*, Tenn. Code Ann. § 67-4-1029 (enacted in 2005); Nev. Rev. Stat. § 370.329 (enacted in 2005).

This is precisely the type of non-uniform regulatory burden that Congress sought to eliminate with the expansive preemption clause it included in the ADA and extended via the FAAAA.[7] Such an assortment of inconsistent state laws will "impede the free flow of trade, traffic and transportation in interstate commerce" in violation of Congress' intent, even if the states had the best of motives in enacting them. Thus, regardless of the worthiness of a state's reason for enacting it, the ADA and the FAAAA preempt any state law "related to" the services of air, motor, or intermodal carriers, including Sections 1555-C(3)(C) and 1555-D of Maine's Tobacco Delivery Law. To the extent that state policy concerns about health, safety, and welfare can be addressed only by regulation "related to" the prices, routes, or services of air and motor carriers, the states should ask Congress to impose national requirements to protect the public's interest.

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[7] Petitioner insists that *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424 (2002), shows that Congress was not concerned about a patchwork of non-preempted state regulations. *See* Pet. Br. at 33, 42. In fact, as the *City of Columbus* decision shows, Congress was worried about a burdensome patchwork even with regard to regulations—unlike those at issue here—that it had specifically exempted from preemption. Thus, although Congress had explicitly excepted state safety regulations from preemption by the FAAAA, its concern that such regulations would "cause an unreasonable burden on interstate commerce" led it to empower the Secretary of Transportation to invalidate local safety regulations whose "multiplicity threatens to clog the avenues of commerce." *City of Columbus*, 536 U.S. at 441–42.

III. BECAUSE THE ADA AND THE FAAAA SHARE IDENTICAL PREEMPTIVE LANGUAGE, THE PRESUMPTION AGAINST PREEMPTION HAS NO APPLICATION IN THIS CASE.

Petitioner and its *amici* wrongly assert that a presumption against preemption arises in this case simply because Maine enacted Sections 1555-C(3)(C) and 1555-D pursuant to its police power. *See* Pet. Br. 25; States' *Amici* Br. 7; Br. of the Nat'l Conference of State Legislatures, et al. as *Amici Curiae* 4–10. While this Court has applied a presumption against preemption in certain circumstances, it has held that such a presumption does not apply in every case where a state has exercised its police power. *See United States v. Locke*, 529 U.S. 89, 108 (2000) (refusing to apply the presumption).[8] Instead, whether a presumption against preemption arises depends on the field in which Congress has legislated and whether the "state laws . . . in question bear upon" that field. *Id.* at 108. When Congress has legislated in a field that it (rather than the states) has historically regulated and the state laws at issue "bear upon" that field, "an assumption of nonpre-emption is not triggered." *Id.*; *see also Flagg v. Yonkers Sav. & Loan Ass'n*, 396 F.3d 178, 183 (2d Cir. 2005) ("The presumption against federal preemption disappears . . . in fields of regulation that have been substantially occupied by

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[8] The Court's refusal to apply the presumption against preemption in *Locke* demonstrates that its earlier comment that the presumption applied in all cases, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), was mere dicta.

federal authority for an extended period of time."). Because no presumption against preemption by the ADA would arise in the context of Sections 1555-C(3)(C) and 1555-D, there is likewise no presumption against preemption by the FAAAA.

No presumption against preemption by the ADA would arise with regard to the challenged provisions of Maine's Tobacco Delivery Law because, in enacting the ADA, Congress legislated in the field of air transportation, a field with a history of significant federal presence. Congress' involvement in the air transportation industry began in 1938, with its enactment of the Civil Aeronautics Act of 1938, Pub. L. No. 75-706, 52 Stat. 973 (1938), which established a scheme of comprehensive regulation of the airline industry.[9] In 1958, Congress adopted "a more comprehensive regulatory regime" for the air

[9] Justice Jackson described the extent of federal control of air transportation this way:

> [Planes] move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government.

Northwest Airlines v. Minnesota, 322 U.S. 292, 303 (1944) (Jackson, J., concurring).

transportation industry, *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 927 n.7 (5th Cir. 1997), and, in the early 1970s, engaged in even "greater governmental involvement in the airline market," PAUL STEPHEN DEMPSEY, Transportation: A Legal History, 30 TRANSP. L.J. 235, 313 (2003). And, although Congress freed air carriers from much of this control with the advent of deregulation and the passage of the ADA in 1978, it did not open the field for control by the states. Instead, Congress explicitly prohibited states from exercising control in the field of air transportation by enacting the ADA's broad preemption clause, which is now codified at 49 U.S.C. § 41713(b)(1). Thus, the field in which Congress acted in enacting the ADA—air transportation—is one that has long been occupied by the federal government, rather than the states.

Sections 1555-C(3)(C) and 1555-D of Maine's Tobacco Delivery Law "bear upon" this field of air transportation. The very title of Maine's law—An Act to Regulate the Delivery and Sales of Tobacco Products and to Prevent the Sale of Tobacco Products to Minors, 2003 Me. Laws 444—indicates that it affects the delivery of packages through air transportation, which is the primary service offered by some members of the Airline Association, such as FedEx Express. The substance of Maine's law dictates which air carriers tobacco retailers may use and regulates those air carriers' delivery of tobacco products. Petitioner even admits that Maine's Tobacco Delivery law "regulate[s] carriers," Pet. Br. i, and is "literally . . . related to carrier services," Pet. Br. 22–23. Since some members of the Airline Association provide the kinds of services Maine's Tobacco Delivery Law seeks to regulate, the

Law clearly "bear[s] upon" air transportation. Thus, Maine's Sections 1555-C(3)(C) and 1555-D "regulate[] in an area where there has been a history of significant federal presence." *Locke*, 529 U.S. at 108.

In this circumstance, it is immaterial that Maine may have enacted Sections 1555-C(3)(C) and 1555-D due, in part, to concern about the health of its citizens, as petitioner and *amici curiae* in support of petitioner contend. *See* Pet. Br. 25; States' *Amici* Br. 8–9; Br. of the Nat'l Conference of State Legislatures, et al. as *Amici Curiae* 4-10. In *Locke*, the Court considered whether federal statutes governing oil tankers preempted laws enacted by Washington State, pursuant to its police powers, to protect its local environment from the damages of oil spills. *Locke*, 529 U.S. at 95–97. Although the Court recognized both the "historic role of the States to regulate local ports and waters" and that Washington's laws were enacted under its police powers, the Court also determined that Washington's laws bore upon the historically federal fields of national and international maritime commerce. *Id.* at 108–09. Because Washington's laws impinged on those historically federal fields, whether intentionally or not, no presumption against preemption was triggered. *Id.*; *see also, e.g., United Parcel Serv., Inc. v. Flores-Galarza*, 318 F.3d 323, 336 (1st Cir. 2003) (no presumption against preemption arises where a state tax law bears on the field of air transportation, even though taxation is a field historically reserved to the states). In other words, no presumption against preemption arises when state legislation implicates two fields—one historically

subject to federal authority and one historically subject to state authority.[10]

This principle applies with full force here. Regardless of whether Maine specifically intended Sections 1555-C(3)(C) and 1555-D to bear upon air transportation, the fact is that they do so (even if they also implicate the field of public health). Because air transportation is a field with a history of significant federal presence, there is no presumption of non-preemption of those laws by the ADA or, as the Court put it in *Locke*, "there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police power." *Locke*, 529 U.S. at 108; *see Morales*, 504 U.S. at 383–91 (ignoring the presumption against preemption, over the dissent's argument that it should apply, in interpreting the ADA). Likewise, because Congress intended the preemptive scope of the FAAAA to be identical to that of the ADA, *see supra*, the presumption also has no application in the context of the FAAAA. *See N.H. Motor Transp. Ass'n v. Rowe*, 377 F. Supp. 2d 197, 206 (D. Me. 2005) (because the presumption against preemption does not apply to air transportation, it also does not apply to ground transportation "because the purpose of the FAAAA's preemption provisions was to even the playing field for air and ground transportation").

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[10] The presumption against preemption will arise when both the federal statute and the state legislation implicate only a field of traditional state authority, such as public health. *See Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 666 (2003); *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715–18 (1985).

IV. SECTIONS 1555-C(3)(C) AND 1555-D ARE CLEARLY PREEMPTED BY THE PLAIN LANGUAGE OF THE ADA AND THE FAAAA.

No presumption against preemption is appropriate in this case. *See supra*. Even if such an "assumption of nonpre-emption" were to apply with regard to Sections 1555-C(3)(C) and 1555-D, however, it would make no difference because the express preemptory language of the FAAAA would overcome it. *See Egelhoff v. Egelhoff*, 532 U.S. 141, 151 (2001) (any presumption against federal preemption of state law is overcome "where . . . Congress has made clear its desire for pre-emption"). Congress has expressed its desire for the preemption of laws like Sections 1555-C(3)(C) and 1555-D through the plain language of the ADA. *See Holloway v. United States*, 526 U.S. 1, 6 (1999) ("[T]he language of the statutes that Congress enacts provides 'the most reliable evidence of its intent.'") (quoting *United States v. Turkette*, 452 U.S. 576, 593 (1981)). And, because the FAAAA contains preemptive language identical to that of the ADA, it also overcomes any presumption against preemption as to the statutory provisions at issue here.

Sections 1555-C(3)(C) and 1555-D are preempted by the plain language of the ADA because they directly relate to the services of any air carrier that might be a "delivery service" under the Maine statute. Those statutes purport to require air carriers to comply with a number of requirements in the course of delivering packages to recipients in Maine. Under Maine's law, delivery services, including air carriers, who wish to avoid penalties are asked, at the very least, to: (1) inspect packages for markings indicating that they contain tobacco products, 22 Me. Rev. Stat. Ann. tit. 22, § 1555-D; (2) examine lists provided by Maine's Attorney General to determine if the sender is a licensed tobacco retailer in Maine, *id.*; (3) refuse to deliver packages from anyone listed as an unlicensed tobacco retailer (unless the recipient is licensed), *id.*; (4) deliver packages only to the specific addressee, *id.* § 1555-C(3)(C)(1); (5) obtain the age of the addressee from the sender, *id.* § 1555-C(3)(C)(2); (6) require the addressee to sign for the package, *id.*; and (7) verify, by requesting to see government-issued, photo identification, the age of any addressee under twenty-seven years old, *id.* § 1555-C(3)(C)(3).

These types of activities—sorting and handling packages, refusing delivery of packages, delivering packages when the addressee is not available, delivering packages with or without obtaining a signature, etc.—comprise the heart of the services provided by those Airline Association members that provide delivery services. As such, Sections 1555-C(3)(C) and 1555-D are "related to" the services of an air carrier within the meaning of the ADA.[11]

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[11] Some carriers have voluntarily adopted policies limiting their delivery of tobacco products. FedEx Express, for example, delivers tobacco products only from one licensed dealer or distributor to another licensed dealer or distributor. *See* FedEx Service Guide, *available at* http://www.fedex.com/us/services/terms/popup_tc_us_body.html#tobaccoproducts. That is irrelevant to ADA preemption analysis, however, because, as this Court has recognized, the distinction between a self-imposed limitation and

(continued...)

Accordingly, Sections 1555-C(3)(C) and 1555-D are preempted by the plain language of the ADA and, because the two statutes share identical preemptory language, by the FAAAA.[12]

CONCLUSION

Because the ADA preempts Sections 1555-C(3)(C) and 1555-D of Maine's Tobacco Delivery Law, the FAAAA should preempt them as well. This is so even if the presumption against preemption applies, which it clearly does not. Accordingly, *amici curiae* FedEx Express and the Air Transport Association of America,

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[11](...continued)
a legally imposed one is significant. *See Wolens*, 513 U.S. at 221 ("We hold that the ADA's preemption prescription bars state-imposed regulation of air carriers, but allows room for court enforcement of contract terms set by the parties themselves."). Moreover, FedEx Express' Service Guide makes clear that the responsibility for complying with state regulations lies with the shipper, while Maine's Tobacco Delivery Law attempts to impose that responsibility on the carrier.

[12] The "tenuous, remote, and peripheral" exception has no application here. Under this exception, the ADA does not preempt a state law whose connection with the prices, routes, or services of an air carrier is simply too distant. *See Morales*, 504 U.S. at 390. As discussed above, the requirements that Sections 1555-C(3)(C) and 1555-D purport to impose affect core services that an air carrier may provide. The connection between the statutes and an air carrier's services, therefore, is anything but tenuous, remote, or peripheral.

Inc., urge the Court to affirm the grant of judgment in favor of Respondents.

Respectfully submitted,

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